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July 8, 2019

By Certified Mail
Ms. Bonnie Bush, City Clerk
City of Santa Cruz
809 Center Street
Santa Cruz, CA 95060

Re: **Notice of Violation of California Voting Rights Act**

Dear Ms. Bush:

On behalf of Travis Roderick, a member of a protected class and a registered voter in the City of Santa Cruz, this letter and the enclosed report are to assert that the City of Santa Cruz's method of conducting elections may violate the California Voting Rights Act (the "CVRA").

Pursuant to California law, the Santa Cruz City Council now has 45 days from receipt of this letter to adopt a resolution outlining its intention to transition from at-large to district elections, specifying the detailed steps it will take to facilitate this transition, and estimating the time-frame for this transition. If the City Council does not adopt a resolution to this effect within 45 days from the receipt of this letter, then a legal action will be commenced in California State Court (Santa Cruz County) to require the City of Santa Cruz to institute district elections pursuant to the CVRA.

District elections are sweeping California, as described in the enclosed report. As far as I and my colleagues are aware, no government agency in California has successfully defended a complaint alleging violation of the CVRA. Accordingly, we recommend a collaborative settlement with the City of Santa Cruz that would cap costs and enable more participation by the City Council in the transition to district elections than would be the case through a court action.

As described in Chapter 5 of the enclosed report, advantages of a settlement agreement could include deferring implementation of district elections until the November 2022 election. This approach has proved successful in other government jurisdictions.

A difficulty of requiring district elections in November 2020 that other entities have identified is that doing so would require the time and expense of two districting processes in two years – one for November 2020 (using 2010 census data), and a new process for November 2022 after the decennial 2020 census. Some jurisdictions have asked for a process whereby these costs in time and money could be incurred only once through commencement of district elections in 2022 through an amicable settlement.

In either case – whether the City would seek implementation through a settlement agreement of district elections in November 2020 or in November 2022 – reimbursement costs

are capped at $30,000, adjusted for inflation, if this is resolved before the expiration of the statutory period. It may also be possible to institute an at-large elected Mayor as a result of a settlement agreement. Please see the conditional settlement agreement reached in the City of Carpinteria included as Exhibit G in the enclosed report for additional information.

As you are aware, a number of other government jurisdictions in Santa Cruz county and elsewhere in the state have decided to institute district elections. We believe the City of Santa Cruz will be an even better and more representative city with district elections – and in unassailable compliance with state law.

Thank you for your consideration.

Very truly yours,

Micah D. Fargey
micah@fargeylaw.com

cc: Martin Bernal, City Manager
Mayor Martine Watkins
Vice Mayor Justin Cummings
Councilmember Sandy Brown
Councilmember Drew Glover
Councilmember Chris Krohn
Councilmember Cynthia Matthews
Councilmember Donna Meyers
Anthony P. Condotti, City Attorney

Enclosures

Abridgment of Latino Voting Rights

and

Racially Polarized Voting

in the

City of Santa Cruz

California Voting Rights Project
July 2019

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Abridgment of Latino Voting Rights and Racially Polarized Voting in the City of Santa Cruz

Introduction

The case for establishing district elections in the City of Santa Cruz is very strong. According to the United States Census Bureau America Community Survey estimate for 2017, the city is approximately 36 percent comprised of residents of protected classes, including 20.6 percent Hispanic or Latino. Yet, since the year 2000, Latinos have comprised only 7.4 percent of all candidates for City Council, 7.1 percent of elected candidates, and received only 6.1 percent of all votes cast for City Council. Only 2 Latino candidacies have been successful for the Santa Cruz City Council since the year 2000, both the same individual. There are many instances of racially polarized voting in the City of Santa Cruz on state and local ballot measures, and for state and local offices.

Abridgment of voting rights and racially polarized voting characterize candidate elections and other electoral choices in the City of Santa Cruz. This is reflected both in the small number of Latino candidates who have sought election and been elected to the Santa Cruz City Council and in other electoral choices in Santa Cruz, both within the city and of government jurisdictions including the City of Santa Cruz. There is also much evidence of the extent to which Latinos in the City of Santa Cruz bear the effects of past discrimination in such areas as education, employment, and health.

The United States Voting Rights Act and, especially, the California Voting Rights Act provide strong protections for members of protected classes to challenge at-large forms of election to government bodies in court and to replace them with district elections. Pursuant to the California Voting Rights Act: "An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class" (Sec. 14027).

To date, no government jurisdiction in California has prevailed in a challenge to its electoral system on the basis of the California Voting Rights Act.

The current, at-large method of City Council elections in the City of Santa Cruz impairs the ability of a protected class to elect candidates of its choice and its ability to influence the outcome of elections. Therefore, district elections must be instituted in the City of Santa Cruz.

1. United States Voting Rights Act

The United States Voting Rights Act is landmark federal legislation prohibiting racial discrimination in voting. Passed in 1965 in the wake of suppression of civil rights in Selma and Montgomery, Alabama, the United States Voting Rights Act is intended to enforce the voting rights guaranteed by the 14th and 15th Amendments to the United States Constitution and, in particular, the provisions of the 15th Amendment: "The right to citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race ... [or] color."

According to the United States Voting Right Act: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color ... A violation ... is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens ... in that its members have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice. The extent to which members of a protected class have been elected to office in the ... political subdivision is one circumstance which may be considered" (52 U.S. Code Sec. 10301).

The United States Supreme Court "has long recognized that multi-member districts and at-large voting schemes may operate to minimize or cancel out the voting strength" of protected classes (*Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)). Although legal actions against government jurisdictions in California to require district elections have been brought since 2002 pursuant to the California Voting Rights Act, the United States Voting Rights Act also provides explicit and strong protection for the voting rights of members of protected classes.

2. California Voting Rights Act

Building upon the United States Voting Rights Act, the California Voting Rights Act was passed by the California legislature in 2001 and signed into law in 2002 to allow legal challenges to government jurisdictions in California with at-large methods of election to require them to institute district elections. According to the Rose Institute of State and Local Government at Claremont McKenna College, the statewide leader in gathering information on the transition from at-large to district elections: "The California Voting Rights Act was written to promote the use of by-district elections to encourage the election of candidates preferred by previously 'underrepresented' voters such as Latinos."[1] A copy of the California Voting Rights Act is included here as Exhibit B and incorporated herein by this reference.

As previously cited, the core provision of the California Voting Rights Act (CVRA) is:

> 14027. An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or abridgment of the rights of voters who are members of a protected class.

The CVRA could not be more clear. An at-large method of election is **illegal** in California when it impairs the ability of members of a protected class to elect candidates of their choice or to influence the outcomes of elections as a result of dilution of the vote or abridgment of the rights of voters who are members of the protected class. Upon showing vote dilution or abridgment of the rights of voters who are members of a protected class, **at-large methods of election must be discontinued**.

According to Section 14028 of the CVRA: "A violation of Section 14027 is established if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision." In addition: "Other factors such as ... the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health ... are probative ... factors to establish a violation" of the CVRA (Sec. 14028(e)).

The CVRA is clear with respect to what the remedy for illegal, at-large elections is: "Upon a finding of a violation ..., the court shall implement appropriate remedies, **including the imposition of district-based elections**, that are tailored to remedy the violation" (Sec. 14029, emphasis added). Though a remedy for a violation of the CVRA other than single-member district elections may be contemplated here, no remedy has in fact been ordered by a California court for violation of the California Voting Rights Act other than district elections.

When, as in the City of Santa Cruz, a government jurisdiction uses an illegal, at-large method of election, district elections must be instituted.

To date, dozens of legal actions have been brought against cities, school districts, special districts, and other government jurisdictions in California for violation of the California Voting Rights Act. All have been successful. The replacement of at-large elections by district elections is sweeping the state as a result of the CVRA.

California cities to institute district elections since 2016 are presented in the table on the next page. More than 100 California cities now utilize district elections. Many California cities and other government jurisdictions with a smaller total population and with protected class populations smaller as a proportion of the population than in the City of Santa Cruz have implemented district elections in recent years. In addition, more than 160 California public school districts have implemented district elections in recent years, including Santa Cruz City Schools.

The California Voting Rights Act was ruled constitutional by a California Court of Appeal in *Sanchez v. City of Modesto* in 2007. This decision held: "The CVRA is race neutral. It does not favor any race over others or allocate burdens or benefits to any groups on the basis of race. It simply gives a cause of action to members of any racial or ethnic group that can establish that its members' votes are diluted."[2] The court also held: "Curing vote dilution is a legitimate government interest"; and: "To prove a violation, plaintiffs ... do not need to show that members of a protected class live in a geographically compact area."[3]

The CVRA further states: "Proof of an intent on the part of the voters or elected officials to discriminate against a protected class is not required" (Section 14028(d)) to sustain a legal action brought pursuant to the California Voting Rights Act.

A. California Cities to Institute District Elections Since 2016 (Partial List)

Anaheim
Banning
Bellflower
Brentwood
Buellton
Buena Park
Camarillo
Carlsbad
Carpinteria
Cathedral City
Chino
Citrus Heights
Claremont
Corona
Costa Mesa
Chino
Dixon
Duarte
Eastvale
El Cajon
Fort Bragg
Fremont
Fullerton
Garden Grove
Goleta
Hemet
Hesperia
Highland
King City
Lodi
Menlo Park
Merced
Novato
Oceanside
Oxnard
Palmdale
Palm Springs
Paso Robles
Patterson
Rancho Cucamonga
Redwood City
Riverbank
San Clemente
San Juan Capistrano
San Rafael
Santa Clara
Santa Maria
Santee
Stanton
Sunnyvale
Turlock
Upland
Vallejo
Visalia
Vista
West Covina
Wildomar
Woodland
Yucaipa

3. Abridgment of Latino Voting Rights and Racially Polarized Voting in the City of Santa Cruz

Abridgment of Latino voting rights and racially polarized voting characterize elections in the City of Santa Cruz. The following table presents the candidates in each City Council election since 2000 and the number of votes they received. An asterisk (*) is placed next to Latino candidates:

B. City Council Candidates and Votes They Received In City of Santa Cruz, 2000 to Present

Year	Candidate	Votes
2000	Reilly	14,350
	Kennedy	9,801
	Primack	9,577
	Porter	9,576
	Bugental	6,918
	Morr	6,812
	Leff	6,146
	Hernandez*	6,095
	Doubrava	5,558
	Cook	4,785
	Argue	2,947
	Fathy	2,357
	Bryant	1,901
	Olthof	1,656
	Steward	1,222
2002	Rotkin	10,766
	Matthews	10,337
	Fitzmaurice	7,235
	Giacchino	5,606
	Lopez*	3,449
	Argue	2,593
	Leavitt	2,309
	Thomasser	2,060
	Baer	2,054
	Eselius	1,998
	McMillan	772

Year	Candidate	Votes
2004	Reilly	18,475
	Coonerty	17,379
	Madrigal*	13,227
	Porter	12,466
	Kennedy	11,898
	Primack	11,372
	Fogel	5,072
2006	Matthews	12,748
	Rotkin	11,580
	Robinson	10,223
	Van Allen	6,763
	Kenyatta	4,873
	Cobb	4,125
2008	Coonerty	17,056
	Lane	13,944
	Beiers	11,642
	Madrigal*	11,365
	Terrazas	11,320
	Fitzmaurice	9,171
	Kenyatta	5,105
	Molyneux	4,224
	Cabrera*	2,166
	Canada	1,945
2010	Bryant	11,666
	Robinson	11,238
	Terrazas	10,503
	Pomerantz	6,713
	Moon	5,319
	Foster	4,109
	Pleich	1,248
	Ceballos*	810

Year	Candidate	Votes
2012	Lane	15,477
	Matthews	13,636
	Posner	12,593
	Comstock	12,480
	Noroyan	8,971
	Fusari	6,865
	Pinheiro*	6,581
	Pleich	3,732
2014	Chase	9,112
	Terrazas	8,328
	Noroyan	6,758
	Sherman	6,455
	Van Allen	6,041
	Pruger	2,703
	Knutson	1,954
	Bush	1,345
2016	Watkins	13,683
	Matthews	13,500
	Krohn	12,296
	S. Brown	11,325
	Glover	10,770
	Singleton	10,704
	J. Brown	10,609
	Schnaar	10,423
	Pleich	2,461
	Kennedy	2,257
	Davis	1,216
2018	Cummings	12,516
	Meyers	11,862
	Glover	10,972
	Larson	10,274
	Noroyan	9,996
	Hawthorne	6,445
	Scontriano	4,410
	Crawford	3,701
	Concannon	3,276
	Lane	1,553

The next table presents the total number of candidates in each Santa Cruz City Council election since 2000, the number of candidates elected, the number of Latino candidates, and the number of Latino candidates elected:

C. Santa Cruz City Council Elections Since 2000, Candidates

Year	Total Candidates	Elected Candidates	Latino Candidates	Elected Latinos
2000	15	4	1	0
2002	11	3	1	0
2004	7	4	1	1
2006	6	3	0	0
2008	10	4	2	1
2010	8	3	1	0
2012	8	4	1	0
2014	8	3	0	0
2016	11	4	0	0
2018	10	3	0	0
Total:	**94**	**28**	**7**	**2**

As can be seen, only 7.4% of all candidates for the Santa Cruz City Council since 2000 have been Latinos, and only 7.1% of elected candidates have been Latinos.

The table on the top of the next page presents the number of total votes in each Santa Cruz City Council election since 2000, the number of votes cast for Latino candidates, and the percentage of total votes that were cast for Latino candidates:

D. Santa Cruz City Council Elections Since 2000, Votes

Year	Total Votes	Latino	Percentage
2000	89,701	6,095	6.8
2002	49,179	3,449	7.0
2004	89,889	13,227	14.7
2006	50,312	0	0
2008	87,938	13,531	15.4
2010	51,606	810	1.6
2012	80,335	6,581	8.2
2014	42,696	0	0
2016	99,244	0	0
2018	75,005	0	0
Total:	**715,905**	**43,693**	**6.1**

As can be seen, only 6.1% of all votes cast for candidates for the Santa Cruz City Council since 2000 have been for Latinos.

Racially polarized voting characterizes elections in the City of Santa Cruz. Latinos have been underrepresented in candidacies, elected candidates, and votes received, as have members of most other protected classes. According to the 2017 United States Census Bureau American Community Survey estimate, the number and percentage of different ethnic groups in the City of Santa Cruz is:

E. City of Santa Cruz City Ethnicity, 2017

Group	Population	Percentage
White	40,796	63.8
Latino	13,171	20.6
Asian	6,170	9.6
African Am	898	1.4
Native Am	438	.7
Multi/Other	2,520	3.9
Total:	**63,993**	**100.0**

Furthermore, pursuant to the California Voting Rights Act, it is not necessary that racially polarized voting be demonstrated only in elections to a government jurisdiction's governing board. Rather: "'Racially polarized voting' means voting in which there is a difference ... in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate" (Sec. 14026(e))--regardless of whether the differences in voting occur for the governing board or council of the government jurisdiction in which district elections are sought.

This point is made clear by legal specialists in districting, electoral issues, and voting rights Marguerite Leoni and Christopher Skinnell. They write in "The California Voting Rights Act," published by the *Public Law Journal* (vol. 32, Spring 2009), an official publication of the State Bar of California Public Law Section, and distributed by the League of California Cities:

> **No Minority Candidates.**
>
> The fact that no members of the minority group have ever run for membership on the legislative body will not insulate a jurisdiction from CVRA challenge. The CVRA expressly provides that a violation can be shown if racially-polarized voting occurs in elections incorporating *other* electoral choices that affect the rights and privileges of members of a protected class, such as ballot measures. (Elec. Code Sec.s 14028(a) & (b).) Some particularly obvious examples ... might include Proposition 187 (denying services to undocumented immigrants), [and] Proposition 209 (preventing state agencies from adopting affirmative action programs) ... But other local measures may also serve the same purpose.[4]

This article also states that the California Voting Rights Act "makes fundamental changes to minority voting rights law in California"; the CVRA "alters established paradigms of proof and defenses ..., thus making it easier for plaintiffs in California to challenge allegedly discriminatory voting practices"; the CVRA "prescribe[s] an extremely light burden ... to establish a violation"; the CVRA "eliminate[s] the first precondition that plaintiffs must prove at the liability stage in federal litigation, that is, that the minority group is sufficiently large and geographically compact to form a majority in a single member district"; the CVRA "eliminates the requirement that plaintiffs prove discrimination"; the CVRA "mandates the award of costs, attorneys' fees, and expert expenses to prevailing

plaintiffs"; the CVRA "denies not only attorneys' fees but also the costs of litigation to prevailing defendants"; the "sole fact that the voters of a city or special district have enacted an at-large electoral system by ballot measure, or rejected a by-district electoral system by ballot measure, will not protect a jurisdiction"; and "Demands by minority group representatives for a change to by-district elections must be taken seriously, even if the minority group is not numerous enough to form a majority in a new single member district. Changing voluntarily permits the elected representatives ... to control the districting process and the considerations that will guide the districting. Once the single member districts are in place, the [government jurisdiction] is in the CVRA safe harbor."[5] A copy of this article is attached here as Exhibit E and incorporated herein by this reference.

Since 2000, there are many state ballot measures that provide evidence of racially polarized voting, vote dilution, or differential voting in the City of Santa Cruz. These include:

F. Racially Polarized Voting, Vote Dilution, or Differential Voting on State Ballot Measures in City of Santa Cruz Since 2000

Year	Ballot Measure	Purpose
2000	21	Juvenile crime
2000	25	Campaign financing limits
2002	45	Term limits
2002	49	After school programs
2002	52	Election day voter registration
2004	56	State budget reform
2004	62	Primary elections
2008	93	Term limits
2010	14	Open primaries
2016	61	State drug purchases
2018	8	Kidney dialysis regulation
2018	10	Local government rent control

At the local level, there are also ballot measures that provide evidence of racially polarized voting, vote dilution, or differential voting in the City of Santa Cruz. These include:

G. Racially Polarized Voting, Vote Dilution, or Differential Voting on Local Ballot Measures in City of Santa Cruz Since 2000

Year	Ballot Measure	Purpose
2000	T	District elections
2000	U	Transient occupancy tax
2008	B	Public safety tax

In addition, there have been a number of candidate elections at the local level in government jurisdictions including the City of Santa Cruz that provide evidence of racially polarized voting, vote dilution, or differential voting. These include elections for the Santa Cruz City Schools Board of Education and for the Santa Cruz Port District. Between 2000 and 2018, no Latino candidates ran in Trustee Area 1 in Santa Cruz City Schools that corresponds to the City of Santa Cruz. Similarly, no Latino candidates ran in the at-large seat for the Santa Cruz City Schools Board of Education between 2000 and 2018 that includes the City of Santa Cruz. Similarly, Latino candidates have been only 9.3% of candidates for the Santa Cruz Port District since 2000, and no Latino has been elected to the Santa Cruz Port District. There is also evidence of racially polarized voting in the 2000 race for District Attorney between Kate Canlis and Ronald Ruiz.

Research indicates that if this analysis were continued through the 1990s, including state and local ballot measures and candidates for state and local offices, it would be possible to demonstrate 30 or more instances of racially polarized voting, vote dilution, or differential voting in the City of Santa Cruz. **Pursuant to the California Voting Rights Act, district elections must be instituted in the City of Santa Cruz.**

Furthermore, the California Voting Rights Act also states: "Other factors such as ... denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, ... are probative, but not necessary factors to establish a violation" (Sec. 14028(e)). As well as the examples of

abridgment of voting rights previously outlined, there is ample evidence of the extent to which Latinos in the City of Santa Cruz bear the effects of past discrimination in areas such as education, employment, and health.

The following table presents comparisons between the white and Latino populations in the City of Santa Cruz on socioeconomic characteristics pertaining to education, employment, and health according to the 2017 United States Census Bureau American Community Survey estimate:

H. Comparison Between White and Latino Populations in City of Santa Cruz on Various Socioeconomic Characteristics, 2017

	White Population	Latino Population
Education		
Adults with high school degree	97.1%	71.8%
Adults with bachelor's degree	57.6%	27.7%
Employment		
Per capita income	$41,701	$17,465
Median household income	$70,861	$50,039
Households receiving food stamps	6.3%	14.7%
Health		
No health insurance	7.4%	10.7%

It should be emphasized that the Latino proportion in Santa Cruz is increasing. The table on the next page presents enrollment by ethnicity in the Santa Cruz City Elementary School District in 2018-19 (source: California State Department of Education):

I. Santa Cruz City Elementary School District
Ethnic Enrollment, 2018-19

Group	Total No.	Percent
African Am	36	1.8
Asian	62	3.1
Latino	761	38.4
Native Am	3	0.2
White	991	50.0
Multi/Other	129	6.5
Total:	1,982	100.0

Clear and compelling evidence exists that the City of Santa Cruz's current, at-large method of election to its City Council is illegal. It is not resulting in adequate representation of Latino residents. In the event this matter were to become the subject of litigation through a lawsuit being filed, it would be possible to establish many examples of abridgment of Latino voting rights, racially polarized voting, vote dilution, differential voting, and the effects of past discrimination. It is inescapable the City of Santa Cruz would be ordered by a court to institute district elections. A draft complaint for violation of the California Voting Rights Act by the City of Santa Cruz is included here as Exhibit A and incorporated herein by this reference in the event that court action is required in this matter.

4. Methods of Instituting District Elections in the City of Santa Cruz

There are two methods by which district elections may be instituted in the City of Santa Cruz: a) litigation, or b) a pre-litigation settlement agreement by the Santa Cruz City Council outlining its intention to transition from at-large to district elections, specifying specific steps it will take to facilitate this transition, and estimating the time-frame for this transition.

If litigation is the path followed, a court action may--at any time after 45 days from the City's receipt of the certified letter notifying it of a violation of the CVRA--be commenced in Santa Cruz County Superior Court against the City of Santa Cruz for violation of the California Voting Rights Act.

If the City of Santa Cruz chooses a pre-litigation settlement, then, pursuant to Section 10010 of the California Elections Code, the process the City must follow, as modified by the settlement agreement, is:

1) Within 45 days of receipt of the certified letter notifying the City of Santa Cruz that its method of conducting elections may violate the CVRA, the Santa Cruz City Council must adopt a resolution outlining its intention to transition from at-large to district elections, specifying specific steps it will take to facilitate this transition, and estimating the time-frame for this transition.

2) If the Santa Cruz City Council passes a resolution to this effect, a legal action may not be commenced for another 90 days after the resolution's passage or until as specified in the settlement agreement.

3) Before district lines are drawn, the Santa Cruz City Council must hold two public hearings at which the public is invited to provide input concerning the composition of districts. In advance of these hearings, the City of Santa Cruz should conduct outreach to the public, including to non-English-speaking communities, explaining the districting process and encouraging participation.

4) Following these two public hearings, the City of Santa Cruz must publish and make available for release at least one draft map and the proposed sequence of elections to the new districts. The Santa Cruz City Council must then hold two more public hearings at which the public is invited to provide input on the draft map or maps and proposed sequence of elections.

5) In determining the sequence of elections, the Santa Cruz City Council must give special consideration to the purposes of the California Voting Rights Act. For this reason, it is very likely that among the first districts in which district elections will be held will be districts including larger proportions of individuals from protected classes.

6) After adopting the resolution of intention to transition from at-large to district elections and holding the public hearings, the Santa Cruz City Council adopts a map of districts and a sequence of elections.

If the City of Santa Cruz establishes district elections according to the above process, as modified by a settlement agreement, no litigation is required.

5. Advantages of a Pre-Litigation Settlement

There are many advantages of a pre-litigation settlement rather than a court action to enforce the California Voting Rights Act to institute district elections. Most importantly, the City of Santa Cruz and the Santa Cruz City Council retain a greater role in and control over the transition process to district elections, and legal costs are limited.

A greater role by the Santa Cruz City Council over the transition to district elections could manifest itself in a number of ways, including:

1) Pursuant to Assembly Bill 2220, passed into legislation in 2016, cities of any size may adopt a resolution to implement district elections, with or without an elective mayor. As a result of a court action, the Santa Cruz City Council would lose the authority to determine the number of districts in the city (six or seven) and whether or not there would be an elective mayor.

2) Participation in timing of the first district elections, whether in 2020 or 2022. If this matter were to go to court, a court would probably require that the first district elections be held in 2020. As a result of a pre-litigation settlement agreement, the first district elections could be held in 2022. Elsewhere in California, settlement agreements have been reached to hold the first district elections in November 2022, following the 2020 census. These settlement agreements have allowed the affected government jurisdiction to commence district elections in 2022, rather than 2020, to save the costs in time and expense of redistricting in both 2020 (using 2010 census data) and 2022. In addition, existing incumbents elected in 2016 would be eligible to run for reelection in 2020 under existing electoral arrangements with a settlement agreement to implement district elections in November 2022.

3) The Santa Cruz City Council would retain the ability to draw the lines of City Council districts both now and in the future, rather than the court drawing the lines of City Council districts through a court-determined process.

4) The existing City Council would be retained, and there would be no chance of a special election. Occasionally in court actions brought pursuant to the CVRA, past at-large elections have been nullified and courts have ordered new, special elections to elect councilmembers from districts.

5) An elected, at-large Mayor could be instituted by the City Council with no vote of the people required pursuant to Assembly Bill 2220 as a result of a California Voting Rights Act settlement.

6) Saving of plaintiffs' attorney fees, and its own legal expenses, by the City of Santa Cruz, potentially saving hundreds of thousands or more than a million dollars.

The preceding are only some of the advantages of a pre-litigation settlement. It should be noted that pursuant to Assembly Bill 2220 passed in 2016, no vote of the people is required to institute district elections in the City of Santa Cruz. A copy of Assembly Bill 2220 is included here as Exhibit C and incorporated herein by this reference.

A copy of the resolution and settlement agreement establishing district elections in the City of Carpinteria is included here as Exhibit G and incorporated herein by this reference.

6. Attorneys' Fees

Pursuant to the CVRA: "In any action to enforce [the California Voting Rights Act] the court shall allow the prevailing plaintiff party ... a reasonable attorney's fee ... and litigation expenses including, but not limited to, expert witness fees and expenses as part of the costs" (Sec. 14030). In addition: "Prevailing defendant parties shall not recover any costs" (id.).

In recent years, many government jurisdictions have been required to pay hundreds of thousands and even millions of dollars in attorneys' fees to prevailing plaintiff parties. According to the Rose Institute: "Another significant effect of the California Voting Rights Act is the financial cost it has imposed on cities--many challenges so far have resulted in settlements or legal awards over one million dollars."[6] In 2015, the City of Santa Barbara was required to pay $599,500 in attorneys' fees and costs to plaintiffs for a settlement reached in the pretrial phase of litigation. Other examples of attorneys' fees settlements under the California Voting Rights Act include the City of Modesto, which was required to pay $3 million; and the City of Palmdale, which was required to pay $4.5 million. It is estimated by the League of California Cities that attorneys' fees settlements in recent years to enforce the CVRA are more than $20 million.[7] Moreover, government jurisdictions are also responsible for their own legal costs, which can also be hundreds of thousands of dollars.

For this reason, the **California Voting Rights Project strongly recommends that government jurisdictions reach settlement in the pre-litigation stage**. In this case, pursuant to Assembly Bill 350 passed into legislation in 2016, costs to cities are capped at $30,000 plus annual CPI adjustment (now, $31,211) for demographic and legal services. It should be emphasized that Assembly Bill 350 applies only to the pre-litigation phase of cases brought pursuant to the CVRA. If a CVRA action becomes the subject of litigation through a complaint being filed, then there is no limit on attorneys' fees and expert costs other than as stated in the CVRA and can be hundreds of thousands or more dollars.

In addition, because Assembly Bill 350 "would impose additional duties on local agencies, the bill would impose a state-mandated local program. The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state.... This bill would provide that, if the Commission on State Mandates determines that the bill contains costs

mandated by the state, reimbursement for these costs shall be made pursuant to ... statutory provisions" (Legislative Counsel's Digest of Assembly Bill 350). Accordingly, it may be possible for the City of Santa Cruz to receive reimbursement from the state for a pre-litigation settlement. A copy of Assembly Bill 350 and the Legislative Counsel's Digest is included here as Exhibit D and incorporated herein by this reference.

7. Benefits of District Elections

Even if the City of Santa Cruz were not required to institute district elections pursuant to the California Voting Rights Act, there are many benefits of district elections which have been experienced in other communities. These include greater voter turn-out and participation. In some cities, turn-out in some precincts increased by as much as one-quarter after district elections were implemented.

District elections bring government closer to the people. They result in representatives who are more knowledgable of local problems and issues. Candidates learn about their voting district when running for office. Voters have a member of the City Council to whom they can turn on issues, and councilmembers become more knowledgeable about area-specific concerns. There is a wider spectrum of views on the City Council and more representation from all neighborhoods and the entire community. District elections lead to greater neighborhood identity and have been accompanied by greater diversity of all sorts on elective bodies.

District elections also result in less expensive political campaigns. It is easier for younger and lower socioeconomic candidates to run for office if they do not have to raise as much money. This results in less influence by special interests. By walking door to door and other inexpensive means, candidates can be elected who would not be elected in at-large elections.

Santa Cruz will be a better city with district elections--more representative of the people, and in compliance with the law. District elections will make elections to the City Council fairer and more inclusive, and will increase participation and representation. The universal experience with district elections in California is that cities and other government jurisdictions have found them to be a superior form of representation, irrespective of the legal requirement.

For further information on the likelihood of district elections being imposed by a court, see the February 21, 2017, Council Agenda Report in the City of Santa Maria, included here as Exhibit F and incorporated herein by this reference. According to this report: "After much analysis and in-depth conversations with those most familiar with these types of litigation matters, staff is recommending that the City Council adopt a resolution declaring its intention to transition from at-large to district-based elections ... Staff makes this

recommendation due to the extraordinary costs to successfully defend against a CVRA lawsuit and the fact that no apparent city has successfully prevailed against a CVRA lawsuit, and that the public interest would best be served by transitioning to a district-based election system."[8]

Because candidates for higher elective office are overwhelmingly elected first to local office, district elections lead in time to greater representation at all levels of elective office. In addition, as members of protected classes are elected to governing boards, there is a tendency for more members of protected classes to become employed by government jurisdictions.

Many government agencies in Santa Cruz County already utilize or have decided to institute district elections, including the Santa Cruz County Board of Supervisors, Santa Cruz County Board of Education, Cabrillo Community College District, City of Watsonville, Pajaro Valley Unified School District, and Santa Cruz City Schools.

Conclusion

Abridgment of voting rights and racially polarized voting have no place in the City of Santa Cruz or anywhere else. Clear and compelling evidence of abridgment of voting rights, racially polarized voting, vote dilution, differential voting, and the effects of past discrimination would sustain a legal action brought pursuant to the California Voting Rights Act to institute district elections in the City of Santa Cruz. A pre-litigation settlement agreement by the Santa Cruz City Council provides the best opportunity to implement district elections in a manner that retains participation by the City Council in the transition process to district elections, and is cost-effective.

Endnotes

[1] Justin Levitt et al., "Quiet Revolution in California Local Government Gains Momentum" (Claremont McKenna College: Rose Institute of State and Local Government, November 3, 2016), p. 1. The Rose Institute remarks on the switch from at-large to district elections in California: "This quiet tectonic shift in local government is accelerating" (id.).

[2] *Sanchez v. City of Modesto*, Court of Appeal, Fifth District, California, No. F048277 (December 6, 2006).

[3] Id.

[4] Marguerite Mary Leoni and Christopher E. Skinnell, "The California Voting Rights Act," *Public Law Journal* (Vol. 32, No. 2, Spring 2009; Official Publication of the State Bar of California Public Law Section; included here as Exhibit E).

[5] Id.

[6] Levitt et al., "Quiet Revolution in California Local Government Gains Momentum," p. 2.

[7] Letter from League of California Cities to Governor Edmund G. Brown, Jr. (September 6, 2016).

[8] City of Santa Maria, "Council Agenda Report" (February 21, 2017; included here as Exhibit F).

Exhibits

A. Draft Complaint Against the City of Santa Cruz for Violation of the California Voting Rights Act

B. California Voting Rights Act

C. Assembly Bill 2220

D. Assembly Bill 350

E. Marguerite Mary Leoni and Christopher E. Skinnell, "The California Voting Rights Act," *Public Law Journal* (Spring 2009)

F. City of Santa Maria Council Agenda Report with Respect to Implementing District Elections

G. Resolution and Settlement Agreement Establishing District Elections in the City of Carpinteria

EXHIBIT “A”

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Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CRUZ

Plaintiffs,

v.

CITY OF SANTA CRUZ, CALIFORNIA, a California political subdivision, and DOES 1 through 25, inclusive,

Defendants.

Case No.

COMPLAINT

For Violations of the California Voting Rights Act of 2001

UNLIMITED CIVIL CASE

JURY TRIAL REQUESTED

Plaintiffs, by and through their counsel of record, hereby bring this action against defendant City of Santa Cruz, California and Does 1 through 25 (collectively "Defendants" or "the defendants"). In support of their complaint, Plaintiffs allege as follows:

I. INTRODUCTION

1. This action is brought by Plaintiffs for injunctive relief against Defendants for their violation of the California Voting Rights Act of 2001, California Elections Code § 14025, *et seq.* (the "CVRA). The imposition of the City of Santa Cruz's at-large method of election has resulted in vote dilution for Latino residents and has denied them effective political participation in elections to the City Council of the City of Santa Cruz. The City of Santa Cruz's at-large method of election for electing members to its City Council prevents Latino residents from electing candidates of their choice in Santa Cruz City Council elections.

2. The effects of the City of Santa Cruz's at-large method of election are apparent and compelling. Pursuant to the 2017 United States Census Bureau American Community Survey estimate, approximately 36 percent of the population of the City of Santa Cruz is non-white. Latinos comprise more than one-fifth of the population of the City of Santa Cruz. Despite a significant Latino population who live in the City of Santa Cruz, there are not currently any Latinos who serve on the Santa Cruz City Council. Only two Latino candidacies for the Santa Cruz City Council since the year 2000 have been successful, and both were by the same individual. Only 6.1 percent of all votes cast in Santa Cruz City Council elections since 2000 have been for Latino candidates. This deficiency of Latino members on, and Latino candidates for, the Santa Cruz City Council reveal the lack of access to the political process.

3. The City of Santa Cruz's at-large method of election violates the CVRA. Plaintiffs bring this action to enjoin the City of Santa Cruz's continued abridgment of Latino voting rights. Plaintiffs seek a declaration from this Court that the at-large method of election

currently employed by the City of Santa Cruz violates the CVRA. Plaintiffs seek injunctive relief enjoining the City of Santa Cruz from further imposing or applying its current at-large method of election. Further, Plaintiffs seek injunctive relief requiring the City of Santa Cruz to design and implement district-based elections to remedy its violation of the CVRA.

II. THE PARTIES

4. At all material times, Plaintiffs are and have been registered voters residing in the City of Santa Cruz and are eligible to vote in the City of Santa Cruz's elections.

5. At all material times, defendant City of Santa Cruz, California, is and has been a political subdivision of the State of California subject to the provisions of the CVRA.

6. Plaintiffs are unaware of the true names and capacities of the defendants sued herein as Does 1 through 25, inclusive, and therefore sue these defendants by such fictitious names. Plaintiffs will amend this complaint to allege the true names and capacities of these defendants when their true names are ascertained. Plaintiffs are informed and believe, and on that basis allege, that the acts and conduct alleged herein of each defendant was known to, authorized by, and/or ratified by the other defendants. Does 1 through 25, inclusive, are individuals or entities that have caused the City of Santa Cruz to violate the CVRA, failed to prevent the City of Santa Cruz's violation of the CVRA, or are otherwise responsible for the acts and omissions alleged herein.

7. Plaintiffs are informed and believe, and allege on that basis, that each defendant named herein, at all times mentioned in this complaint, was the agent, employee, partner, joint venturer, and/or employer of the other defendants and was at all times herein mentioned acting within the course and scope of that agency, employment, partnership, ownership, or joint venture.

III. JURISDICTION AND VENUE

8. All parties hereto are within the unlimited jurisdiction of this Court. The unlawful acts subject to this complaint occurred in Santa Cruz County.

9. Venue is proper in this court because the City of Santa Cruz (sometimes referenced below as the "City") is a public entity located within this county.

IV. GENERAL ALLEGATIONS

A. Political Background on the City of Santa Cruz

10. Based on figures from the 2017 United States Census Bureau American Community Survey estimate, the City of Santa Cruz has a population of approximately 60,993, of whom 20.6 percent are Latinos, 9.6 percent are Asians, 1.4 percent are African Americans, 0.7 percent are Native Americans, and 3.9 percent are two races/ethnicities or other.

11. The City is governed by a City Council. The Santa Cruz City Council serves as the governmental body responsible for the operation of the City. The City Council is comprised of seven members.

12. The City Council of Santa Cruz is elected pursuant to an at-large method of election. Under this method of election, all of the eligible voters of the entire City of Santa Cruz elect the members of the City Council.

13. Vacancies to the City Council are elected on a staggered basis. Every two years, the electorate elects three or four City Council members who each serve a four-year term.

14. No Latino currently serves on the Santa Cruz City Council or has served since 2012, Latinos have been only 7.4 percent of all candidates for the Santa Cruz City Council since 2000, Latinos have been only 7.1 percent of elected candidates to the Santa Cruz City Council since 2000, and Latino candidates have received only 6.1 percent of all votes cast in Santa Cruz City Council elections since 2000.

B. Racial Polarization's Impact on the City of Santa Cruz

15. Elections held within the City of Santa Cruz are characterized by racially polarized voting and vote dilution.

16. Racially polarized voting and vote dilution occur when members of a protected class – as defined by California Elections Code § 14025 (d) – vote for candidates or other electoral choices that differ from the rest of the electorate.

17. Racially polarized voting, vote dilution, and differential voting exist within the City of Santa Cruz. There is a difference between the choice of candidates and other electoral choices that are preferred by Latino voters and the choice of candidates and other electoral choices that are preferred by voters in the rest of the electorate.

18. Racially polarized voting and vote dilution consist of both voter cohesion on the part of Latino voters and voter cohesion by the non-Latino electorate against the choices of Latino voters.

19. Patterns of racially polarized voting, vote dilution, and differential voting have the effect of impeding opportunities for Latino voters to elect candidates of their choice to the at-large City Council positions in the City of Santa Cruz – the non-Latino population dominates elections.

20. Latino voters are harmed by racially polarized voting. Since 2000, there are many examples of racially polarized voting, vote dilution, and differential voting in the City of Santa Cruz on state and local ballot measures and in candidate elections, where Latino voters and other voters have differed in their electoral choices. State ballot measures which provide evidence of racially polarized voting and vote dilution include:

- In 2000, Proposition 21 (juvenile crime);
- In 2000, Proposition 25 (campaign financing limits);

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- In 2000, Proposition 21 (juvenile crime);
- In 2000, Proposition 25 (campaign financing limits);

- In 2002, Proposition 45 (term limits);
- In 2002, Proposition 49 (after school programs);
- In 2002, Proposition 52 (election day voter registration);
- In 2004, Proposition 56 (state budget reform);
- In 2004, Proposition 62 (primary elections);
- In 2008, Proposition 93 (term limits);
- In 2010, Proposition 14 (open primaries);
- In 2016, Proposition 61 (state drug purchases);
- In 2018, Proposition 8 (kidney dialysis regulation); and
- In 2018, Proposition 10 (local government rent control).

21. At the local level, ballot measures that provide evidence of racially polarized voting and vote dilution include:

- In 2000, Measure T (district elections);
- In 2000, Measure U (transient occupancy tax); and
- In 2008, Measure B (public safety tax).

22. In addition at the local level, there were no Latino candidates for the Santa Cruz City Schools Board of Education in Trustee Area 1 (corresponding to the City of Santa Cruz) between 2000 and 2018, and no Latino candidates for the at-large seat (including the City of Santa Cruz). Latino candidates comprised only 9.3% of candidacies for Commissioner of the Santa Cruz Port District between 2000 and 2018, and no Latino was elected a Commissioner of the Santa Cruz Port District.

C. Impact of Polarization on the Latino Community

23. Latinos in the City of Santa Cruz bear the effects of past discrimination in areas such as education, employment, and health. Latinos have graduated at a lower rate from high

school and college than whites, have lower per capita and median household income, have more households receiving food stamps, and have a higher percentage of individuals without health insurance. There are differences in the educational performance of white and Latino students in schools serving Santa Cruz.

24. The at-large method of election voting has caused the dilution of Latino votes in the City of Santa Cruz. Latino voters and the rest of the electorate regularly express different preferences on candidates and other electoral choices, which has been to the detriment of Latino voters.

25. The obstacles posed by the City of Santa Cruz's at-large method of election impairs the ability of Latino voters to elect candidates of their choice in elections held in the City.

26. An alternative method of election exists – district-based elections – that will provide an opportunity for the members of a protected class (as defined by the CVRA) to elect candidates of their choice in City of Santa Cruz elections.

27. All allegations made in this complaint are based upon information and belief, except those allegations which pertain to the named Plaintiffs, which are based on personal knowledge. The allegations of this complaint are stated on information and belief and are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

V. CAUSES OF ACTION

First Cause of Action

(Violation of California Voting Rights Act of 2001)

(Against All Defendants)

28. Plaintiffs hereby reallege and incorporate by reference each and every allegation stated in paragraphs 1 through 27 above as though set forth fully herein.

29. Plaintiffs are registered voters and reside within the City of Santa Cruz.

30. Plaintiffs are members of a protected class of voters under the CVRA.

31. Plaintiffs are over the age of 18 and are eligible to vote in the City's elections.

32. The City is a political subdivision within the State of California.

33. The City employs an at-large method of election, where voters of its entire jurisdiction elect members to its City Council.

34. Racially polarized voting has occurred, and continues to occur, in elections in the City of Santa Cruz and in elections incorporating other electoral choices by voters in the City. As a result, the City's at-large method of election is imposed in a manner that impairs the ability of a protected class as defined by the CVRA to elect candidates of its choice in City of Santa Cruz elections.

35. An alternative method – district-based elections – exists that will provide an opportunity for the members of a protected class as defined by the CVRA to elect candidates of their choice in Santa Cruz City Council elections.

36. An actual controversy has arisen and now exists between the parties relating to the legal rights and duties of Plaintiffs and Defendants, for which Plaintiffs desire a declaration of rights.

37. Defendants' wrongful conduct has caused and, unless enjoined by this Court, will continue to cause immediate and irreparable injury to Plaintiffs and those similarly situated.

38. Plaintiffs, and those similarly situated, have no adequate remedy at law for the injuries they currently suffer and will otherwise continue to suffer.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants, and each of them, as follows:

1. For a decree that the City of Santa Cruz's current at-large method of election for its City Council violates the California Voting Rights Act of 2001;

2. For preliminary and permanent injunctive relief enjoining the City of Santa Cruz from imposing or applying its current at-large method of election;

3. For injunctive relief mandating the City of Santa Cruz to design and implement district-based elections, as defined by the California Voting Rights of 2001, to remedy the City of Santa Cruz's violation of the California Voting Rights Act of 2001;

4. For an award of Plaintiffs' attorney fees, costs, and prejudgment interest pursuant to the CVRA, California Elections Code § 14030, and other applicable law; and

5. For such further relief as the Court deems just and proper.

Dated August ____, 2019

FARGEY LAW PC

By: _____
Micah D. Fargey

Attorneys for Plaintiffs

VII. DEMAND FOR JURY TRIAL

Plaintiffs demands trial of their claims by jury to the extent authorized by law.

Dated August ____, 2019

FARGEY LAW PC

By: _____
Micah D. Fargey

Attorneys for Plaintiffs

EXHIBIT "B"

CALIFORNIA VOTING RIGHTS ACT
ELECTIONS CODE SECTIONS 14025-14032

14025. This act shall be known and may be cited as the California Voting Rights Act of 2001.

14026. As used in this chapter:

(a) "At-large method of election" means any of the following methods of electing members to the governing body of a political subdivision:

(1) One in which the voters of the entire jurisdiction elect the members to the governing body.
(2) One in which the candidates are required to reside within given areas of the jurisdiction and the voters of the entire jurisdiction elect the members to the governing body.
(3) One that combines at-large elections with district-based elections.

(b) "District-based elections" means a method of electing members to the governing body of a political subdivision in which the candidate must reside within an election district that is a divisible part of the political subdivision and is elected only by voters residing within that election district.

(c) "Political subdivision" means a geographic area of representation created for the provision of government services, including, but not limited to, a general law city, general law county, charter city, charter county, charter city and county, school district, community college district, or other district organized pursuant to state law.

(d) "Protected class" means a class of voters who are members of a race, color, or language minority group, as

this class is referenced and defined in the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.).

(e) "Racially polarized voting" means voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.), in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate. The methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.) to establish racially polarized voting may be used for purposes of this section to prove that elections are characterized by racially polarized voting.

14027. An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class, as defined pursuant to Section 14026.

14028. (a) A violation of Section 14027 is established if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision. Elections conducted prior to the filing of an action pursuant to Section 14027 and this section are more probative to establish the existence of racially polarized voting than elections conducted after the filing of the action.

(b) The occurrence of racially polarized voting shall be determined from examining results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral

choices that affect the rights and privileges of members of a protected class. One circumstance that may be considered in determining a violation of Section 14027 and this section is the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of an action based on Section 14027 and this section. In multiseat at-large election districts, where the number of candidates who are members of a protected class is fewer than the number of seats available, the relative groupwide support received by candidates from members of a protected class shall be the basis for the racial polarization analysis.

(c) The fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation of Section 14027 and this section, but may be a factor in determining an appropriate remedy.

(d) Proof of an intent on the part of the voters or elected officials to discriminate against a protected class is not required.

(e) Other factors such as the history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns are probative, but not necessary factors to establish a violation of Section 14027 and this section.

14029. Upon a finding of a violation of Section 14027 and Section 14028, the court shall implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation.

14030. In any action to enforce Section 14027 and Section 14028, the court shall allow the prevailing plaintiff party, other than the state or political subdivision thereof, a reasonable attorney's fee consistent with the standards established in Serrano v. Priest (1977) 20 Cal.3d 25, 48-49, and litigation expenses including, but not limited to, expert witness fees and expenses as part of the costs. Prevailing defendant parties shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation.

14031. This chapter is enacted to implement the guarantees of Section 7 of Article I and of Section 2 of Article II of the California Constitution.

14032. Any voter who is a member of a protected class and who resides in a political subdivision where a violation of Sections 14027 and 14028 is alleged may file an action pursuant to those sections in the superior court of the county in which the political subdivision is located.

EXHIBIT "C"

AB-2220 Elections in cities: by or from district. (2015-2016)

Assembly Bill No. 2220

CHAPTER 751

An act to amend Section 34886 of the Government Code, relating to elections.

[Approved by Governor September 28, 2016. Filed with Secretary of State September 28, 2016.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2220, Cooper. Elections in cities: by or from district.

Existing law generally requires all elective city offices, including the members of a city council, to be filled at large by the city electorate at a general municipal election. Existing law, at any municipal election or special election held for this purpose, authorizes the legislative body of a city to submit to the registered voters an ordinance providing for the election of members of the legislative body by district or from district, as defined, and with or without an elective mayor. Existing law also authorizes the legislative body of a city with a population of fewer than 100,000 people to adopt an ordinance that requires the members of the legislative body to be elected by district or by district with an elective mayor without being required to submit the ordinance to the voters for approval.

This bill would delete the population limitation in that provision, thereby authorizing the legislative body of a city to adopt an ordinance that requires the members of the legislative body to be elected by district or by district with an elective mayor without being required to submit the ordinance to the voters for approval.

The bill also would make a conforming change to these provisions.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 34886 of the Government Code is amended to read:

34886. Notwithstanding Section 34871 or any other law, the legislative body of a city may adopt an ordinance that requires the members of the legislative body to be elected by district or by district with an elective mayor, as described in subdivisions (a) and (c) of Section 34871, without being required to submit the ordinance to the voters for approval. An ordinance adopted pursuant to this section shall include a declaration

that the change in the method of electing members of the legislative body is being made in furtherance of the purposes of the California Voting Rights Act of 2001 (Chapter 1.5 (commencing with Section 14025) of Division 14 of the Elections Code).

EXHIBIT "D"

AB-350 District-based municipal elections: preapproval hearings. (2015-2016)

Assembly Bill No. 350

CHAPTER 737

An act to amend Section 10010 of the Elections Code, relating to elections.

[Approved by Governor September 28, 2016. Filed with Secretary of State September 28, 2016.]

LEGISLATIVE COUNSEL'S DIGEST

AB 350, Alejo. District-based municipal elections: preapproval hearings.

Existing law provides for political subdivisions that encompass areas of representation within the state. With respect to these areas, public officials are generally elected by all of the voters of the political subdivision (at-large) or by districts formed within the political subdivision (district-based). Existing law requires a political subdivision, as defined, that changes from an at-large method of election to a district-based election to hold at least 2 public hearings on a proposal to establish the district boundaries of the political subdivision before a public hearing at which the governing body of the political subdivision votes to approve or defeat the proposal.

This bill would instead require a political subdivision that changes to, or establishes, district-based elections to hold public hearings before and after drawing a preliminary map or maps of the proposed district boundaries, as specified.

Existing law, the California Voting Rights Act of 2001 (CVRA), prohibits the use of an at-large method of election in a political subdivision if it would impair the ability of a protected class, as defined, to elect candidates of its choice or otherwise influence the outcome of an election. The CVRA provides that a voter who is a member of a protected class may bring an action in superior court to enforce its provisions.

This bill would require a prospective plaintiff under the CVRA to first send a written notice to the political subdivision against which the action would be brought indicating that the method of election used by the political subdivision may violate the CVRA. The bill would permit the political subdivision to take ameliorative steps to correct the alleged violation before the prospective plaintiff commences litigation, and it would stay the prospective plaintiff's ability to file suit for a prescribed amount of time. This bill would also permit a prospective plaintiff who sent a written notice, as described, to recover from the political subdivision reasonable costs incurred in supporting the written notice.

Because the bill would impose additional duties on local agencies, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 10010 of the Elections Code is amended to read:

10010. (a) A political subdivision that changes from an at-large method of election to a district-based election, or that establishes district-based elections, shall do all of the following before a public hearing at which the governing body of the political subdivision votes to approve or defeat an ordinance establishing district-based elections:

(1) Before drawing a draft map or maps of the proposed boundaries of the districts, the political subdivision shall hold at least two public hearings over a period of no more than thirty days, at which the public is invited to provide input regarding the composition of the districts. Before these hearings, the political subdivision may conduct outreach to the public, including to non-English-speaking communities, to explain the districting process and to encourage public participation.

(2) After all draft maps are drawn, the political subdivision shall publish and make available for release at least one draft map and, if members of the governing body of the political subdivision will be elected in their districts at different times to provide for staggered terms of office, the potential sequence of the elections. The political subdivision shall also hold at least two additional hearings over a period of no more than 45 days, at which the public is invited to provide input regarding the content of the draft map or maps and the proposed sequence of elections, if applicable. The first version of a draft map shall be published at least seven days before consideration at a hearing. If a draft map is revised at or following a hearing, it shall be published and made available to the public for at least seven days before being adopted.

(b) In determining the final sequence of the district elections conducted in a political subdivision in which members of the governing body will be elected at different times to provide for staggered terms of office, the governing body shall give special consideration to the purposes of the California Voting Rights Act of 2001 (Chapter 1.5 (commencing with Section 14025) of Division 14 of this code), and it shall take into account the preferences expressed by members of the districts.

(c) This section applies to, but is not limited to, a proposal that is required due to a court-imposed change from an at-large method of election to a district-based election.

(d) For purposes of this section, the following terms have the following meanings:

(1) "At-large method of election" has the same meaning as set forth in subdivision (a) of Section 14026.

(2) "District-based election" has the same meaning as set forth in subdivision (b) of Section 14026.

(3) "Political subdivision" has the same meaning as set forth in subdivision (c) of Section 14026.

(e) (1) Before commencing an action to enforce Sections 14027 and 14028, a prospective plaintiff shall send by certified mail a written notice to the clerk of the political subdivision against which the action would be brought asserting that the political subdivision's method of conducting elections may violate the California Voting Rights Act.

(2) A prospective plaintiff shall not commence an action to enforce Sections 14027 and 14028 within 45 days of the political subdivision's receipt of the written notice described in paragraph (1).

(3) (A) Before receiving a written notice described in paragraph (1), or within 45 days of receipt of a notice, a

political subdivision may pass a resolution outlining its intention to transition from at-large to district-based elections, specific steps it will undertake to facilitate this transition, and an estimated time frame for doing so.

(B) If a political subdivision passes a resolution pursuant to subparagraph (A), a prospective plaintiff shall not commence an action to enforce Sections 14027 and 14028 within 90 days of the resolution's passage.

(f) (1) If a political subdivision adopts an ordinance establishing district-based elections pursuant to subdivision (a), a prospective plaintiff who sent a written notice pursuant to subdivision (e) before the political subdivision passed its resolution of intention may, within 30 days of the ordinance's adoption, demand reimbursement for the cost of the work product generated to support the notice. A prospective plaintiff shall make the demand in writing and shall substantiate the demand with financial documentation, such as a detailed invoice for demography services. A political subdivision may request additional documentation if the provided documentation is insufficient to corroborate the claimed costs. A political subdivision shall reimburse a prospective plaintiff for reasonable costs claimed, or in an amount to which the parties mutually agree, within 45 days of receiving the written demand, except as provided in paragraph (2). In all cases, the amount of the reimbursement shall not exceed the cap described in paragraph (3).

(2) If more than one prospective plaintiff is entitled to reimbursement, the political subdivision shall reimburse the prospective plaintiffs in the order in which they sent a written notice pursuant to paragraph (1) of subdivision (e), and the 45-day time period described in paragraph (1) shall apply only to reimbursement of the first prospective plaintiff who sent a written notice. The cumulative amount of reimbursements to all prospective plaintiffs shall not exceed the cap described in paragraph (3).

(3) The amount of reimbursement required by this section is capped at $30,000, as adjusted annually to the Consumer Price Index for All Urban Consumers, U.S. city average, as published by the United States Department of Labor.

SEC. 2. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

EXHIBIT "E"

THE CALIFORNIA VOTING RIGHTS ACT

Marguerite Mary Leoni*
Christopher E. Skinnell**

In 2002, the California Voting Rights Act, S.B. 976, was signed into law. (Elec. Code §§ 14027-14032.) The Act makes fundamental changes to minority voting rights law in California. As of January 1, 2003, the California Voting Rights Act ("CVRA") alters established paradigms of proof and defenses under the federal Voting Rights Act, thus making it easier for plaintiffs in California to challenge allegedly discriminatory voting practices.[1] The potential consequences of this legislation are significant: it could force a city or special district to abandon an electoral system that may be perfectly legal under

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Ms. Leoni has represented and currently represents numerous state agencies, municipalities, counties, school districts and other special districts on districting, redistricting and electoral matters. She has assisted in all phases of such cases including design of plans, the public hearing process, analysis of proposed alternatives, enactment procedures, referenda, districting and redistricting, preparing and advocating preclearance submissions to the U. S. Department of Justice, and defending federal court litigation concerning the legality of electoral systems under the federal constitution and Voting Rights Act. She represented the Administrative Office of the Courts on federal Voting Rights Act issues and electoral questions pertaining to trial court unification in California. She also represented the Florida Senate in designing that state's Senate and Congressional districts, Voting Rights Act preclearance, and in defending against ensuing state and federal court challenges. She also represented the consultant to Arizona's Independent Redistricting Commission in designing redistricting plans for Arizona's state legislative and congressional districts.

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Prior to attending law school, he was a political consultant to several California legislative and initiative campaigns, a research associate at the Rose Institute of State and Local Government, and chairman of a successful initiative campaign in Southern California.

Mr. Skinnell has extensive experience with voting rights matters, both from the legal and technical perspectives. In addition to working on various voting rights lawsuits, he has published numerous articles and studies on voting rights and redistricting, has served as the technical/GIS consultant on several municipal redistrictings, and has prepared a successful preclearance submission to the U.S. Department of Justice under Section 5 of the Voting Rights Act.

[1] As noted in a celebratory press statement by the Mexican American Legal Defense and Education Fund (MALDEF) following the passage of S.B. 976, which along with the ACLU and voting rights attorney Joaquin Avila, was a primary supporter of the CVRA, the "[b]ill makes it easier for California minorities to challenge 'at-large' elections."

federal law, in the process exposing the jurisdiction to the possibility of paying very high awards of attorneys fees to plaintiffs.[2]

California's cities, counties, and special districts have had almost four decades of experience in complying with the federal Voting Rights Act ("federal VRA"), especially Section 2, the landmark legislation outlawing both intentional discrimination in voting practices and those practices that have unintentional but discriminatory effects when viewed in the totality of the circumstances. (Voting Rights Act of 1965, Pub. L. No. 89-110, Stat. 437 (1965), codified as amended at 42 U.S.C. §§ 1971, 1973-1973ff-6 (1994).) Indeed, California has adopted compliance with Section 2 as one of its statutory redistricting criteria for cities, counties, and special districts. (*See, e.g.,* Elec. Code §§ 21601 [general law cities], 21620 [charter cities], & 22000 [special districts].) After decades of litigation under the federal VRA, the courts have provided a wealth of guidance for cities and special districts in identifying practices that may have discriminatory effects. Most notable in California is the prevalence of the "at-large" electoral system (see description below). Jurisdictions have learned to consider changing to a district-based electoral system when they have minority group residents who are sufficiently numerous and geographically concentrated to form a majority in a single-member district, especially when that minority group, despite running candidates for election, consistently fails to elect.

But now the voting rights legal environment with which cities and special districts have grown familiar has changed significantly. Here are some of the highlights.

CVRA Highlights.

- **Focus of the CVRA: "At-large" and "From-district" Elections.**

If your city or special district elects its governing board members "by-district," (*i.e.*, only by the voters of the district, sometimes called "division" or "area," in which the candidate resides), you can stop reading now. The CVRA does not apply to a by-district electoral system. However, if you have an "at-large" or "from-district" system, read on!

The CVRA applies only to at-large and from-district electoral systems, or combination systems. (Elec. Code §§ 14026(a), 14027.) At-large systems are those in which each member of the governing board is elected by all the voters in the jurisdiction. Most

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[2] In federal voting rights cases, the litigation bill can run to hundreds of thousands of dollars even for a small jurisdiction of a few thousand people. *See* Florence Adams, *Latinos and Local Representation: Changing Realities, Emerging Theories* 73 (Garland 2000) (noting that in the City of Dinuba, California, the costs of federal voting rights litigation added up to nearly $60 per person, more than the annual cost of Dinuba's Fire Department). In a voting rights case filed against the City of Santa Paula in 2000 and recently settled, the City reportedly spent $700,000 for attorneys fees. *See* T.J. Sullivan, "Santa Paula Quiet on Measure D," *Ventura County Star* B-01 (Oct. 20, 2002).

jurisdictions in California, especially smaller jurisdictions, have at-large electoral systems. "From-district" elections differ from at-large systems only in that they require each member of the governing board to live within a particular district. Election, however, is still by all the voters in the jurisdiction, rather than being limited to the voters within a district. There are also combination systems in which, for example, a primary election may be conducted "by-district", but the general election is conducted "from" those same districts, *e.g.*, the top two vote winners in the primary in each district run for election "at-large" in the general election.

Each of these variations is equally vulnerable to challenge if the minority plaintiffs can show that racially-polarized voting undercuts their ability to elect or influence the election of minority-preferred candidates. Features that might cause plaintiffs to scrutinize a city or special district as a potential target for a CVRA challenge include a history of electoral losses by minority candidates or a history of unresolved issues disproportionately affecting the minority community (*e.g.*, affordable housing, street and sidewalk maintenance, juvenile crime, etc.), coupled with a significant proportion of the population that are ethnic or racial minorities.

- **Protection For Minority Electoral "Influence."**

The federal VRA prohibits the use of electoral systems that abridge the ability of minority voters to *elect* candidates of their choice. Thus, if the minority plaintiffs would have still been unable to elect their chosen candidates in the absence of the challenged at-large system, the plaintiff would have very little chance of stating a federal claim (see below). Not so under the CVRA. The CVRA invalidates not only at-large elections that prevent minority voters from electing their chosen candidates, but also those that impair the ability of minority voters to *influence* elections.

To date, such influence claims have enjoyed *very* limited recognition or success in federal litigation, and California jurisdictions have no real experience with them. The U.S. Supreme Court has repeatedly declined to address influence claims in recent years. *See Johnson v. De Grandy*, 512 U.S. 997, 1008-09 (1994); *Holder v. Hall*, 512 U.S. 874, 900 n.8 (1994) (Thomas, J., concurring in judgment); *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993); *Growe v. Emison*, 507 U.S. 25, 41 n.5 (1993). The federal courts in California have refused to sanction such influence suits as well. *See Aldasoro v. Kennerson*, 922 F.Supp. 339, 376 (S.D. Cal. 1995); *DeBaca v. County of San Diego*, 794 F.Supp. 990, 996-97 (S.D. Cal. 1992); *Skorepa v. City of Chula Vista*, 723 F. Supp. 1384, 1391-92 (S.D. Cal. 1989); *Romero v. City of Pomona*, 665 F. Supp. 853, 864 (C.D. Cal. 1987), *aff'd* 883 F.2d 1418, 1424 (9th Cir. 1989).

Indeed, only two federal courts have ever held[3] that the federal VRA requires, rather than merely permits, the creation of influence districts in the absence of a showing of intentional discrimination, and both are of questionable precedential value. *See Armour v. Ohio*, 895 F.2d 1078 (6th Cir. 1990); *East Jefferson Coalition for Leadership & Dev. v. Parish of Jefferson*, 691 F.Supp. 991 (E.D. La. 1988). One of the opinions, *Armour v. Ohio*, was subsequently vacated when rehearing en banc was granted, 925 F.2d 987 (6th Cir. 1991). On remand the district court implicitly sanctioned such claims again, 775 F.Supp. 1044, 1059 n.19 (N.D. Ohio 1991),[4] but later opinions from the Sixth Circuit have not treated *Armour* as binding on this issue, and have, in fact, expressly rejected influence suits. *See Cousin v. Sundquist,* 145 F.3d 818, 828 (6th Cir. 1998) ("We do not feel that an 'influence' claim is permitted under the Voting Rights Act."); *Parker v. Ohio*, 2003 U.S. Dist. LEXIS 8745, *11 (S.D. Ohio). The holding of the second case, *East Jefferson Coalition for Leadership*, was effectively undermined when the court subsequently amended the finding that necessitated the influence claim: that the minority community was too widely dispersed in the jurisdiction to constitute a majority in a single-member district. *See East Jefferson Coalition for Leadership & Dev. v. Parish of Jefferson,* 926 F.2d 487, 491 (5th Cir. 1991) (noting the amended finding that the minority group could indeed constitute a majority in a single-member district).

Given the reluctance of federal courts to enter the political thicket of influence suits, by opening the door to such claims the CVRA greatly expands protection for minority voting rights and, consequently, the potential for liability of cities and special districts.

The next question, of course, is obvious: what constitutes "influence"? The answer, unfortunately, is not so obvious. The CVRA does not define "influence" and there is very little federal precedent on which to rely for guidance. As the federal district court for Rhode Island put it in *Metts v. Almond*:

> "Ability to influence" itself, is a nebulous term that defies precise definition. If it means only the potential to alter the outcome of an election, it provides no standard at all because a single voter can be said to have that ability. On the other hand, if it means something more, there does not appear to be any workable definition of how much more is required and/or any meaningful way to determine whether the requirement has been satisfied.

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[3] Several other courts have assumed as much, without so deciding, instead ruling on other grounds. *See, e.g., Voinovich*, 507 U.S. at 154; *West v. Clinton*, 786 F.Supp. 803, 806 (W.D. Ark. 1992).

[4] The district court in *Armour* purported to avoid the question of influence claims. *See* 775 F.Supp. at 1059 n.19 ("We need not reach the question of whether [an influence claim] may be viable under the Voting Rights Act because we find that the plaintiffs have met their burden of demonstrating an ability to elect a candidate of their choice."). But as Judge Batchelder noted in dissent, the Court only avoided the issue by first holding that the plaintiffs need not constitute a majority in the reconfigured district. 775 F.Supp. at 1079 (Batchelder, J., dissenting). In so ruling, "the majority opinion effectively h[eld] that there is a cause of action under Section 2 when political boundaries are drawn so that they fail to maximize a minority group's ability to influence the outcome of elections." *Id.*

217 F.Supp.2d 252, 258 (D.R.I. 2002).

Nevertheless, defining "influence" is the task that a California court may soon face. The definition may well be case-specific to the demographic and political circumstances in each defendant jurisdiction, leaving local jurisdictions without clear guidelines.

- **Streamlined Proof for Plaintiffs.**

Federal voting rights cases under Section 2 require that a successful plaintiff show that (1) the minority group be sufficiently large and geographically compact to form a majority of the eligible voters in a single-member district, (2) there is racially-polarized voting, and (3) there is white bloc voting sufficient usually to prevent minority voters from electing candidates of their choice. *Thornburg v. Gingles,* 478 U.S. 30, 50-51 (1986). If (and only if) all three of these "preconditions" are proven, the court then proceeds to consider whether, under the "totality of circumstances" the votes of minority voters are diluted. (42 U.S.C. § 1973(b) [prescribing the totality of the circumstances standard].)

The CVRA, by contrast, purports to prescribe an extremely light burden on the plaintiff to establish a violation. Under the CVRA, plaintiffs apparently can prove a violation based *solely* on evidence of racially-polarized voting. (Elec. Code §§ 14027 & 14028(e).) Racially-polarized voting is defined as "voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act (42 U.S.C. Sec. 1973 et seq.), in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and the electoral choices that are preferred by voters in the rest of the electorate." (Elec. Code § 14026(e).) *See Ruiz v. City of Santa Maria*, 160 F.3d 543, 552 (9th Cir. 1998) (adopting relatively lenient "separate electorates" test for determining whether a candidate was a minority-preferred candidate who was defeated by white bloc voting), *cert. denied*, 527 U.S. 1022 (1999).

The CVRA appears to eliminate the first precondition that plaintiffs must prove at the liability stage in federal litigation, that is, that the minority group is sufficiently large and geographically compact to form a majority in a single member district. (Elec. Code § 14028(c).) Assuming that racially-polarized voting can be proven, the CVRA defers inquiry into the size and geographical compactness of the minority group and the impact of those factors on the minority voters' ability to elect or ability to influence elections, to the remedial phase of the litigation. (See discussion below.)

The CVRA also eliminates the requirement that plaintiffs prove discrimination under the totality of the circumstances test. (Elec. Code § 14028(e).) This departure from the federal standards may prove to be the most significant. Some federal courts have been very lenient in finding racially-polarized voting. They could afford to be so lenient,

because, under federal law, establishing racially-polarized voting is not sufficient to prove a violation. The other *Thornburg v. Gingles* preconditions must be established and a violation must be proven in the "totality of the circumstances" phase of the lawsuit. The totality analysis then permits a federal judge to take into account such matters as the *degree* of the racially-polarized voting and perhaps find that it was not severe enough to warrant judicial intervention into the electoral processes of a city.

The CVRA does not require any comparable "totality of the circumstances" analyses as part of the plaintiff's proof. Under what would seem to be a draconian application of the CVRA, plaintiffs could argue that a jurisdiction is subject to liability if 51% of minority voters vote one way, 51% of non-minority voters vote the other way, and the minority-preferred candidate loses. Whether a court would sanction such an extreme application of the CVRA, without the subsequent safety valve of the totality analysis, cannot be known at this time. Another plausible reading of the CVRA is that the Legislature meant to ease the burden on plaintiffs but still permit the totality analysis to come in by way of defense. (Elec. Code § 14028(e) [stating that many of the traditional totality factors are "probative," but not necessary to establish a violation].)

Despite the fact that Section 14028(a) provides that a violation is established if racially-polarized voting is shown, the legislation does identify at least one other factor that bears on the question of liability. Specifically the CVRA provides that the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class have been elected to the governing body of a jurisdiction is "one circumstance that may be considered *in determining a violation*." (Elec. Code § 14028(b) [emphasis added].) Thus phrased, the relevance of such evidence would not appear to be limited to the remedial stage, but would affect the question of liability as well. Moreover, the phraseology suggests that other, unspecified circumstances may be considered on the question of liability as well. Under the federal scheme, minority plaintiffs whose preferred candidates have a winning record would find it difficult, if not impossible, to establish a violation of the federal VRA. Presumably this would be the result under the CVRA, but the new law is not explicit on that point. Also, the CVRA specifies that the successful candidate must also be a member of the minority group in order to be taken into consideration as "one circumstance" that may be considered at the liability phase of the litigation. The CVRA is silent on whether the election of non-minority persons who are proven to be the preferred candidates of minority voters can also be considered. Plaintiffs may well argue that such successful minority-preferred candidates do not count.

- **New Remedies.**

The most likely remedy in a successful CVRA action would be to order cities and special districts with at-large, from-district, or mixed electoral systems to change to by-district systems in which a minority group will be empowered either to elect its preferred candidates, or influence the election outcome. But judicial remedies under the Act may

not be limited to the imposition of a by-district system. In cases where the minority group may be too small to form a majority in a single member district (*i.e.,* a district from which one member of the governing board is elected), the CVRA mandates that a court impose remedies "appropriate" to the violation. Indeed, the advocates of limited or cumulative voting systems may see the CVRA as an opportunity to attempt to impose such experimental remedies in California.

In a limited voting system, voters either cast fewer votes than the number of seats, or political parties nominate fewer candidates than there are seats. Theoretically, the greater the difference between the number of seats and the number of votes, the greater the opportunities for minorities to elect their chosen candidates. Versions of limited voting are used in Washington, D.C., Philadelphia (PA), Hartford (CT) and many smaller jurisdictions.

In a cumulative voting system, voters cast as many votes as there are seats. But unlike winner-take-all systems, voters are not limited to giving only one vote to a candidate. Instead voters can cast some or all of their votes for one or more candidates. Chilton County (AL), Alamogordo (NM), and Peoria (IL) all use a version of cumulative voting, as do a number of smaller jurisdictions. The State of Illinois used cumulative voting for state legislative elections from 1870 to 1980.

- **No-Risk Litigation For Plaintiffs.**

The CVRA mandates the award of costs, attorneys fees, and expert expenses to prevailing plaintiffs. (Elec. Code § 14030.) Prevailing defendants, however, are not treated so kindly. The CVRA denies not only attorneys fees but also the costs of litigation to prevailing defendants, unless the court finds a suit to be "frivolous, unreasonable, or without foundation," an extremely high standard. (*Id.*)

Furthermore, California law interprets "prevailing party" more broadly than does the analogous federal law governing attorneys fees awards for actions brought under Section 2 of the Voting Rights Act. The United States Supreme Court has, as a matter of statutory interpretation, recently rejected the "catalyst" theory of prevailing parties. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Servs.,* 532 U.S. 598, 603-05 (2001). The catalyst theory, which the California Supreme Court has previously approved, permits recovery of attorneys fees if there is any "causal connection" between the plaintiffs' lawsuit and a change in behavior by the defendant. *Maria P. v. Riles,* 43 Cal.3d 1281, 1291 (1987). The *Maria P.* court continued:

> "'The appropriate benchmarks in determining which party prevailed are (a) the situation immediately prior to the commencement of suit, and (b) the situation today, and the role, if any, played by the litigation in effecting any changes between the two.'" . . . An award of attorney fees under section 1021.5 is

> appropriate when a plaintiff's lawsuit "'was a *catalyst* motivating defendants to provide the primary relief sought,'" or when plaintiff vindicates an important right "'by activating defendants to modify their behavior.'"

Id. at 1291-92 (quoting *Folsom v. Butte County Assn. of Governments,* 32 Cal.3d 668, 685 n.31 (1982); *Westside Community for Independent Living, Inc. v. Obledo,* 33 Cal.3d 348, 353 (1983)) (internal citations omitted).

Federal law, by contrast, requires some "change [in] the legal relationship between [the plaintiff] and the defendant." *Buckhannon,* 532 U.S. at 604 (quoting *Texas State Teachers Assn. v. Garland Independent School Dist.,* 489 U.S. 782, 792 (1987)). In other words, it is not enough under federal law that the defendant changed its conduct voluntarily—there must be some legally compelled impediment to the defendant falling back into the old ways, like a judgment or a settlement.

The California Supreme Court has traditionally treated federal precedent interpreting 42 U.S.C. § 1988 as persuasive authority, but it has also held that such federal precedent is not binding with regards to interpretation of state attorneys fee law. *See Serrano v. Unruh,* 32 Cal.3d 621, 639 n.29 (1982). Thus, the *Buckhannon* holding will not inevitably lead California to reject the catalyst theory in CVRA litigation as well.

Charter Cities.

Charter cities should not be complacent in a belief that they are immune from successful challenge under the new CVRA. The CVRA, after all, purports to apply to "cities" without making any explicit distinction between general law or charter cities. (Elec. Code § 14026(c).) It is true that a charter can provide for a form of government or electoral process for a city that is different from the general law. A charter city, however, remains subject to the California Constitution and would be prohibited from adopting or maintaining a discriminatory electoral system or electoral practices that violate the equal protection clause or the right to vote. *See Canaan v. Abdelnour,* 40 Cal.3d 703 (1985), *overruled on other grounds by Edelstein v. City & County of San Francisco*, 29 Cal.4th 164, 183 (2002); *Rees v. Layton,* 6 Cal.App.3d 815 (1970). Furthermore, California courts have recognized that state statutes can override city charters if they are narrowly-tailored to address an issue of statewide concern, even in the core areas of charter city control like election administration. *Edelstein*, 29 Cal.4th at 172-174; *Johnson v. Bradley,* 4 Cal.4th 389, 398-400 (1992). The CVRA expressly provides that it is intended to implement the guarantees of Section 7 of Article I (Equal Protection) and Section 2 of Article II (Right to Vote) of the California Constitution, which are themselves regarded as matters of statewide concern. *See Cawdrey v. City of Redondo Beach*, 15 Cal.App.4th 1212, 1226 (1993).

It is always possible that the California Supreme Court would decide that, even if preserving the right to vote is a matter of statewide concern, the CVRA sweeps too broadly and cuts too deeply into municipal affairs in violation of the principle of home rule. As the Supreme Court has noted, "[T]he sweep of the state's protective measures may be no broader than its interest." *Johnson,* 4 Cal.4th at 400. *Cf. Bd. of Trustees. of the Univ. of Ala. v. Garrett,* 531 U.S. 356, 365 (2000) (when Congress seeks to enforce constitutional protections with legislation, the statutory scheme must be congruent and proportional to the injury to be prevented or remedied); *City of Boerne v. Flores*, 521 U.S. 507 (1997). For example, charter cities could argue that, assuming eradicating the adverse effects of racially-polarized voting in at-large electoral systems is a matter of statewide concern, the CVRA is not narrowly-tailored because the federal VRA presents a scheme more carefully-crafted to weed out those at-large systems in which, under the totality of circumstances, minority voting rights are abridged, and leave in place those at-large systems in which a minority candidate may have simply lost an election.

Vote of the People.

The sole fact that the voters of a city or special district have enacted an at-large electoral system by ballot measure, or rejected a by-district electoral system by ballot measure, will not protect a jurisdiction. Indeed, the latter may increase the risk to the jurisdiction by serving as persuasive proof of a violation of the CVRA if the by-district system was rejected in an election characterized by a racially-polarized vote.

No Minority Candidates.

The fact that no members of the minority group have ever run for membership on the legislative body will not insulate a jurisdiction from CVRA challenge. The CVRA expressly provides that a violation can be shown if racially-polarized voting occurs in elections incorporating *other* electoral choices that affect the rights and privileges of members of a protected class, such as ballot measures. (Elec. Code §§ 14028(a) & (b).) Some particularly obvious examples from the last decade might include Proposition 187 (denying state services to undocumented immigrants), Proposition 209 (preventing state agencies from adopting affirmative action programs), and Proposition 227 (barring the use of bilingual education in California public schools). *See Cano v. Davis*, 211 F.Supp.2d 1208, 1241 n.37 (C.D. Cal. 2002) (assuming these initiatives may be used to demonstrate racially-polarized voting). But other local measures may also serve the same purpose.

CONCLUSION

California's cities and special districts are entering a new and uncertain era in voting rights law. Much about the CVRA is unclear and federal precedent on key issues appears to have been legislatively overruled. It may require years of litigation to sort it all out. It

is impossible to know now whether California courts will uphold the constitutionality of the CVRA, how they will interpret the new law, or what defenses will be available. Perhaps the "totality of the circumstances" test will be reinvigorated by way of defense. In the meantime, there is a safe harbor under the CVRA (though still not necessarily under the federal Voting Rights Act): a by-district electoral system.

Jurisdictions with a history of electoral losses by candidates who are members of a minority group should consider analyzing those elections for racially-polarized voting. If polarized voting is detected, these jurisdictions may want to consider whether a change to a by-district electoral system is warranted. Demands by minority group representatives for a change to by-district elections must be taken seriously, even if the minority group is not numerous enough to form a majority in a new single member district. Changing voluntarily permits the elected representatives and the voters, rather than adverse plaintiffs or a court, to control the districting process and the considerations that will guide the districting. Once the single member districts are in place, the city or special district is in the CVRA safe harbor, even if the districts are not exactly those that plaintiffs would have preferred.

EXHIBIT "F"

COUNCIL AGENDA REPORT

TO: City Council

FROM: City Manager and City Attorney

SUBJECT: **RESOLUTION DECLARING THE CITY OF SANTA MARIA'S INTENTION TO TRANSITION FROM AN AT-LARGE CITY COUNCIL ELECTED PROCESS TO A DISTRICT-BASED ELECTION PROCESS PURSUANT TO ELECTIONS CODE SECTION 10010**

RECOMMENDATION:

That the City Council adopt a resolution declaring its intention to transition from an at-large City Council election process to a district-based elections process, outlining specific steps it will take and providing an estimated timeline for doing so pursuant to Elections Code Section 10010.

BACKGROUND:

The City received a certified letter on December 16, 2016, from Jason Dominguez, Esq., on behalf of his client Hector Sanchez, an unsuccessful candidate for City Council in the November 2016 election, asserting that the City's at-large electoral system violates the California Voting Rights Act, codified at California Elections Code sections 14025–14032 ("CVRA"). Mr. Dominguez claims "polarized voting" may be occurring and threatens litigation if the City declines to adopt district-based elections.

The CVRA was signed into law in 2002. The law was motivated, in part, by the lack of success by plaintiffs in California in lawsuits challenging at-large electoral systems brought under the Federal Voting Rights Act ("FVRA"). In fact, the City of Santa Maria had successfully defended a FVRA lawsuit in the early 1990's brought by the Mexican American Legal Defense and Education Fund. This litigation cost over $1 million to defend and took ten years to resolve in the City's favor.

The passage of the CVRA made it much easier for plaintiffs to prevail in lawsuits against public entities that elected their members to its governing body through "at-large" elections with the ultimate goal to transition to "district-based" elections. By way of background, in a district-based election system, a candidate must live in the district he or she wishes to represent.

It is staff's understanding that no such FVRA lawsuits have been filed in California since 2000. Accordingly, all voting rights lawsuits in California have been filed under the CVRA since its passage. Under the CVRA, to prove a violation, plaintiffs must only demonstrate that there is "racially polarized voting." This occurs when there is a

difference between the choice of candidates preferred by voters in a protected class and the choice of candidates preferred by voters in the rest of the electorate. Plaintiffs in other litigation have taken the position that the CVRA does not require a showing of discriminatory intent or an actual electoral injury. They have further argued that the CVRA does not require proof that racially polarized voting actually resulted in the defeat of a group's preferred candidate. No appellate court has yet ruled on these issues.

Cities throughout the State have increasingly been facing legal challenges to their "at-large" systems of electing City Council members. Almost all have settled claims out of court by essentially agreeing to voluntarily shift to district-based elections, while others have defended CVRA challenges through the courts. Ultimately, these cities have either voluntarily adopted, or have been forced to adopt, district-based elections. The exception is the City of Santa Clarita that resolved the CVRA action filed against it by agreeing to change the date of its general municipal election to November of even-numbered years.

Cities that have attempted to defend their existing "at-large" system of City Council elections in court have incurred significant legal costs, including attorneys' fees incurred by plaintiffs. Awards in these cases have reportedly ranged from about $400,000 to over $3,500,000. When sued, the settlements entered into by cities typically have included paying the plaintiff's attorney fees. For example, in February 2015, the City of Santa Barbara reportedly paid $800,000 in attorneys' fees and expert costs to settle their CVRA lawsuit. Another example is the City of Palmdale that incurred expenses in excess of $4.5 million in its unsuccessful attempt to defend against a lawsuit brought under the CVRA. Moreover, what is most concerning is that staff is unaware of any city that has prevailed in defending its "at-large" system of election under a claim filed by any individual or group under the CVRA. Accordingly, staff has concluded that the public's best interest is in preserving and protecting vital general fund revenues from being unnecessarily expended (given the low probability of defending against a CVRA lawsuit) and that this interest outweighs the public's interest in maintaining the current at-large voting system.

DISCUSSION:

Accordingly, after much analysis and in-depth conservations with those most familiar with these types of litigation matters, staff is recommending that the City Council adopt a resolution declaring its intention to transition from at-large to district-based elections following the procedures required by Elections Code section 10010, as amended by AB 350, to establish voting districts. Staff makes this recommendation due to the extraordinary costs to successfully defend against a CVRA lawsuit and the fact that no apparent city has successfully prevailed against a CVRA lawsuit, and that the public interest would best be served by transitioning to a district-based electoral system.

While the City has a sustained history of electing Latinos/as to the City Council, the outcome of litigation is always uncertain. Unlike other cities where at-large elections have prevented Latinos from electing candidates of their choice, the election history for the Santa Maria City Council has demonstrated that Latino candidates have been

regularly elected. Since 1996, at least one Latino/a has been elected to the City Council in each election except the November 2012 election where a Latina candidate (Waterfield) lost by only two votes. In all, ten Latinos/as have been elected to the City Council in the last twenty years. In addition, partly because of appointments made by the City Council to fill unexpired terms, the City Council has been represented by a Latino majority from 2002 until 2010 and the current City Council is a Latino elected majority. Not withstanding the aforementioned history of being able to elect Latinos to the City Council, the CVRA essentially makes any at-large election vulnerable to challenge with a low probability of successfully defending against such a challenge.

Staff estimates that the cost to defend this lawsuit would exceed $1,000,000 even if it were successful, and would likely exceed $2,000,000 if the plaintiff prevailed and the City was ordered to pay plaintiff's attorneys' fees. These attorney fees and costs would be a General Fund liability which would be a significant unexpected expense that could not come at a worse time since the City already has a multi-million dollar structural budget deficit AND pension-related expenses continue to escalate.

It should be noted that Government Code section 34886 permits the legislative body of any city to adopt an ordinance establishing election of members of the legislative body by district. AB 350 was recently adopted by the State Legislature and became effective on January 1, 2017, and amended Elections Code section 10010 to place a cap of a maximum of $30,000 on attorneys' fees that a plaintiff would be entitled to recover if the target city voluntarily adopted an ordinance to establish voting districts either before or after receiving notice of a CVRA violation. In addition, AB350 prohibits a plaintiff from filing a CVRA lawsuit within 90 days of a city's adoption of a resolution declaring its intention to transition to district-based elections. Accordingly, should the City Council adopt the proposed resolution, the maximum the City will have to reimburse Mr. Dominguez in attorneys' fees and costs is $30,000, and plaintiff would be prohibited from filing a CVRA lawsuit until May 22, 2017.

Alternatives:

1. The City Council may elect to place this issue on the ballot and let the electorate decide if they prefer district-based elections. However, even if the voters rejected district-based elections, the City would be vulnerable to a CVRA lawsuit if racially polarized voting is occurring in the City.
2. The City Council may direct staff to defend against any CVRA lawsuits that may be filed. This option will be very expensive to defend, and even if successful, would expose the City to an award of costly attorneys' fees.

Fiscal Considerations:

There will be significant staff time needed to transition to district-based elections because of the staff time that will be incurred for the five (5) public hearings that will be required in addition to the cost for a demographics and elections consultant and special legal counsel. Should the City Council concur with staff's recommendation, the City will only be required to reimburse plaintiff for its attorney's fees and costs up to $30,000. In addition, staff expects roughly a $10,000 increase in election costs for district-based

elections during each of the upcoming election cycles. These fiscal impacts are necessary and unavoidable if the Council transitions to district-based elections.

Impact to the Community:
The decision to change from at-large to district-based voting may have a substantial impact on the community since the City Council has been elected at-large since the City's incorporation in 1905. There may be a profound and noticeable impact to the community if the City adopts district-based elections and confusion until district-based elections are fully implemented in 2020. As proposed, two council seats will be elected by-district in the 2018 election and two or three council seats (pending the outcome of the five public hearings) in the 2020 election after the current incumbents have served their full terms. In some situations, the Mayor may be elected at-large, but all other members of the City Council must reside in the district they represent. The decision whether to establish four voting districts with the Mayor elected at-large, or five voting districts is one of the topics that will be decided upon by the City Council as a result of the minimum of five (5) public hearings that will be held as required by California Elections Code section 10010 should it adopt the proposed resolution.

RICHARD J. HAYDON
City Manager

GILBERT A. TRUJILLO
City Attorney

EXHIBIT "G"

RESOLUTION NO. 5743

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CARPINTERIA, CALIFORNIA, DECLARING ITS INTENTION TO TRANSITION FROM AT-LARGE TO DISTRICT-BASED ELECTIONS BY NOVEMBER OF 2022

WHEREAS, members of the City Council of the City Carpinteria are currently elected in "at-large" elections, in which each councilmember is elected by the registered voters of the entire City; and

WHEREAS, California Government Code section 34886 permits the legislative body of a city to change its method of election by ordinance from an "at-large" system to a "district-based" system in which each member of the legislative body is elected by the voters in the district in which the candidate resides; and

WHEREAS, on July 3, 2017, the City received a letter entitled Notice of Violation of California Voting Rights Act ("Notice") from Jatzibe Sandoval and Frank Gonzalez ("Prospective Plaintiffs") asserting that the City's elections are characterized by racially polarized voting and demanding that the City commence the process to transition to district based elections pursuant to the California Voting Rights Act ("CVRA"); and

WHEREAS, a violation of the CVRA is established if it is shown that racially polarized voting occurs in elections (Elections Code section 14028(a)). "Racially polarized voting" means voting in which there is a difference in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate (Elections Code section 14026(e)); and

WHEREAS, the CVRA allows for Prospective Plaintiffs to file a lawsuit against the City if the City does not adopt a resolution of intent to institute district based elections within 45 days of the Notice ("45-day period") (Elections Code section 10010); and

WHEREAS, the Notice states that if the City declines to do adopt a resolution of intention to transition to district elections within the 45-day period, Prospective Plaintiffs will commence a lawsuit to compel district based elections; and

WHEREAS, August 17, 2017 is the 45th day from the date the City received the Notice; and

WHEREAS, at its July 31 special meeting the City Council received public comment on the potential to transition to district elections and a majority of those commenting spoke in favor of instituting a district-based election system; and

WHEREAS, the Prospective Plaintiffs offered to consider a settlement agreement whereby the City would not be required to institute district elections until the November 2022 regular election in order to allow 2020 census data to be taken into account in drawing district boundaries; and

WHEREAS, the City denies that its at-large election system violates the CVRA or any other provision of law and asserts that the City's election system is legal in all respects; and

WHEREAS, the City Council has concluded that the public interest would be served by transitioning to a district-based electoral system due to public support for district elections, the extraordinary cost to defend against a CVRA lawsuit and the uncertainties inherent in litigating a CVRA claim.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF CARPINTERIA AS FOLLOWS:

SECTION 1.
The above recitals are true and correct.

SECTION 2.
Before the November 2022 regular election, the City Council will consider adoption of an ordinance to institute a district-based election system, as authorized by Government Code section 34886.

SECTION 3.
Prior to considering an ordinance to establish district boundaries for a district-based electoral system, the City will follow the requirements pursuant to Elections Code section 10010 to solicit public input in the district map drawing process.

PASSED, APPROVED, AND ADOPTED this 14th day August, 2017 by the following vote:

AYES: COUNCILMEMBER(S):

NOES: COUNCILMEMBER(S):

ABSENT: COUNCILMEMBERS(S):

ABSTAIN: COUNCILMEMBER(S):

CONDITIONAL SETTLEMENT AGREEMENT AND RELEASE

This CONDITIONAL SETTLEMENT AGREEMENT AND RELEASE ("Agreement") is entered into on this 14th day of August, 2017 ("Effective Date") by and between the CITY OF CARPINTERIA, a general law city and municipal corporation ("City"), and JATZIBE SANDOVAL and FRANK GONZALEZ, residents of City ("Prospective Plaintiffs"). The above parties are referred to herein individually as "Party" and collectively as "Parties."

RECITALS

A. Since incorporation in 1965, the City Council has been elected through the at-large election system in which each voter may cast one vote for each Council seat that is up for election.

B. On July 3, 2017, City received a Notice of Violation ("Notice") of the California Voting Rights Act ("Act") from Prospective Plaintiffs, alleging that the City's at-large system of electing City Council members violates the Act and threatening suit unless the City transitions to a district-based electoral system, which is an election method in which the candidate must reside within an election district that is a divisible part of the city and is elected only by voters residing within that election district.

C. On July 31, 2017, the City Council held a public meeting to receive public input on the Notice and the potential for transitioning to a district-based election system. The majority of those commenting spoke in favor of instituting a district-based election system.

D. The City Council denies that the City's at-large electoral system violates the Act. Nevertheless, in recognition of the public support voiced at the July 31 meeting for instituting district-based elections and in recognition that litigation involves significant costs and uncertainty, the City Council desires to enter into this Agreement.

E. The Parties desire to delay the institution of district elections until 2022 so that the district boundaries may be drawn based on 2020 census data, which will not become available until 2021.

F. The Parties now wish conditionally to resolve and settle the Notice and all attendant and potential litigation arising therefrom.

NOW, THEREFORE, in consideration of the mutual covenants and agreements described below, and for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Settling Parties hereby agree:

1. Obligations of Parties

   A. At its regular meeting on August 14, 2017, the City Council will consider approval of a resolution of intent to institute a district-based election system for City Council seats by the November 2022 regular election.[1] The Council retains the discretion to determine

[1] The November 2022 regular election will occur on November 8, 2022. (Elec. Code § 1000(d).)

whether to institute district-based elections for four City Council seats with the mayor elected at large or to institute district elections for all five Council seats with the mayor appointed by the Council.

B. Provided that the City Council adopts the rcsolution described in subsection A, Prospective Plaintiffs shall not bring suit against the City prior to November 9, 2022 for any cause of action related to the City's electoral system, including, but not limited to, suit seeking the implementation of district-based elections or claims related to or arising from the Notice.

C. Provided that the City Council adopts the resolution described in subsection A, within 30 days of such adoption, the City will remit a payment of $30,000 to Prospective Plaintiffs as reimbursement of its costs incurred for the work product to support the Notice in fulfillment of the requirement to reimburse prospective plaintiffs' reasonable costs pursuant to Elections Code section 10010(f). The check will be made payable to Prospective Plaintiffs' attorney-of-record Robert Goodman to his trust account Robert Goodman Trust Account. Pursuant to Elections Code section 10010(f)(1), Prospective Plaintiffs have made a demand for reimbursement and staff has substantiated that the documentation provided by Prospective Plaintiffs represents the demography and legal costs incurred by Prospective Plaintiffs supporting their Notice.

2. Condition Precedent

Prospective Plaintiffs acknowledge, understand and agree that the City Council's passing of the resolution described in Section 1 is an express condition precedent to the consummation of this Agreement and the covenants, conditions and agreements contained herein. In the event that the resolution is not approved as set forth in Section 1, then this Agreement shall be null and void and shall be of no further force and effect. In such event, neither this Agreement, nor any of its terms or provisions, shall be admissible in any action or proceeding initiated by Prospective Plaintiffs for any purpose.

Further, the Prospective Plaintiffs recognize and acknowledge that the City Council is under no obligation to pass the resolution and that the Council reserves its discretion and the full measure of its powers to evaluate the resolution in accordance with applicable procedures, standards and requirements. It is understood and agreed that this Agreement shall not be construed in any fashion as an advance determination and does not provide the Prospective Plaintiffs with any expectation as to the outcome of the City Council's decision on the resolution. The City Council's lack of approval or inaction on the resolution will not constitute a default of this Agreement, but instead will constitute a terminating event of this Agreement.

3. Admissibility of Agreement

If the City does not institute district-based elections for City Council seats by the November 2022 regular election, this Agreement shall not be construed as an admission by the City that such failure to act is unreasonable or unlawful under the Elections Code. In addition, this

Agreement may not be introduced into or be admissible in any judicial proceeding other than a judicial proceeding to enforce the terms of this Agreement.

4. Release

A. Subject to the performance of the Parties' obligations in this Agreement, the Parties hereby fully and finally waive, release, and permanently discharge each other (and their respective officers, employees, agents, representatives and attorneys) (the "Releasees"), from any and all past, present, or future matters, claims, demands, obligations, liens, actions or causes of action, suits in law or equity, or claims for damages or injuries, whether known or unknown, which they now own, hold or claim to have or at any time heretofore have owned, held or claimed to have held against each other by reason of any matter or thing alleged or referred to, or in any way connected with, arising out of or in any way relating to the Notice (collectively, the "Released Claims"). In connection with the release of the Released Claims, the Parties waive any and all rights that they may have under the provisions of section 1542 of the California Civil Code, which states as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

In the event that any waiver of the provisions of Section 1542 of the California Code provided for in this Agreement shall be judicially determined to be invalid, voidable or unenforceable, for any reason, such waiver to that extent shall be severable from the remaining provisions of this Agreement, and the invalidity, voidability or unenforceability of the waiver shall not affect the validity, effect, enforceability or interpretation of the remaining provisions of this Agreement.

B. The Parties understand and acknowledge that the foregoing release extends to any claims or damages, without limitation, arising out of the Released Claims that may exist on the date of the execution of this Agreement, but which the Parties do not know to exist, which, if known, would have materially affected their decision to execute this Agreement, regardless of whether their lack of knowledge is a result of ignorance, oversight, error, negligence or any other cause.

C. Each Party acknowledges and agrees that this Agreement is a compromise and settlement of their disputes and differences, and is not an admission of liability or wrongdoing by any Party.

D. Except as provided in section 1.C. of this Agreement, each of the Parties waives any and all claims for the recovery of any costs, expenses, or fees, including attorney fees, associated with the matters and claims released in this Agreement.

5. Representations and Warranties

A. Prospective Plaintiffs hereby represent and warrant to the City, as of the Effective Date, as follows:

i. They have not heretofore assigned or transferred, or purported to assign or transfer, to any party not named herein any Released Claim, or any part or portion thereof.

ii. To the best of their knowledge, there are no legal actions, suits or similar proceedings pending and served, or threatened in writing against the Prospective Plaintiffs that would adversely affect their ability to consummate the transactions contemplated in this Agreement. To the best of their knowledge, Prospective Plaintiffs are not aware of any existing claims nor of any facts that might give rise to any claims of any type or nature against the City, whether asserted or not, that have not been fully released and discharged by the release set forth in this Agreement.

iii. Prospective Plaintiffs have freely entered into this Agreement and are not entering into this Agreement because of any duress, fear, or undue influence; this Agreement is being entered into in good faith.

iv. Prospective Plaintiffs have made such investigation of the facts pertaining to this Agreement as they deem necessary.

v. Prospective Plaintiffs have, prior to the execution of this Agreement, obtained the advice of independent legal counsel of their own selection regarding the substance of this Agreement and the claims released herein.

B. In executing this Agreement, Prospective Plaintiffs acknowledge, represent, and warrant to the City that they have not relied upon any statement or representation of any City officer, agent, employee, representative, or attorney regarding any facts not expressly set forth within this Agreement. In entering into this Agreement, Prospective Plaintiffs assume the risk of any misrepresentations, concealment or mistake, whether or not they should subsequently discover or assert for any reason that any fact relied upon by them in entering into this Agreement was untrue, or that any fact was concealed from them, or that their understanding of the facts or of the law was incorrect or incomplete.

C. The representations and warranties of each of the Parties set forth in this Section 4 and elsewhere in this Agreement will survive the execution and delivery of this Agreement and are a material part of the consideration to the City in entering into this Agreement.

6. Interpretation

A. The Parties have cooperated in the drafting and preparation of this Agreement and, in any construction or interpretation to be made of this Agreement, the same shall not be construed against any Party. This Agreement is the product of bargained for and arm's

length negotiations between the Parties and their counsel. This Agreement is the joint product of the Parties.

B. This Agreement is an integrated contract and sets forth the entire agreement between the Parties with respect to the subject matter contained herein. All agreements, covenants, representations and warranties, express or implied, oral or written, of the Parties with regard to such subject matter are contained in this Agreement. No other agreements, covenants, representations or warranties, express or implied, oral or written, have been made or relied on by either Party.

C. This Agreement may not be changed, modified or amended except by written instrument specifying that it amends such agreement and signed by both Parties. No waiver of any provision of this Agreement shall be deemed or shall constitute a waiver of any other provision whether or not similar, nor shall any waiver be deemed a continuing waiver; and no waiver shall be implied from delay or be binding unless executed in writing by the party making the waiver.

D. All of the covenants, releases and other provisions herein contained in favor of the persons and entities released are made for the express benefit of each and all of the said persons and entities, each of which has the right to enforce such provisions.

E. This Agreement shall be binding upon and inure to the benefit of each of the Parties, and their respective representatives, officers, employees, agents, heirs, devisees, successors and assigns.

7. Further Cooperation

Each Party shall perform any further acts and execute and deliver any further documents that may be reasonably necessary or appropriate to carry out the provisions and intent of this Agreement. Except as expressly stated otherwise in this Agreement, actions required of the Parties or any of them will not be unreasonably withheld or delayed, and approval or disapproval will be given within the time set forth in this Agreement, or, if no time is given, within a reasonable time. Time will be of the essence of actions required of any of the Parties.

8. No Third Party Beneficiaries

Nothing in this Agreement is intended to benefit any third party or create a third party beneficiary. This Agreement will not be enforceable by any person not a Party to this Agreement.

9. Enforced Delay (Force Majeure)

A. Performance by either Party shall not be deemed to be in default where delays or defaults are due to war, insurrection, strikes, walkouts, riots, floods, earthquakes, fires, acts of terrorism, epidemic, quarantine, casualties, acts of God, litigation, governmental

restrictions imposed or mandated by governmental entities, enactment of conflicting state or federal laws or regulations, or other similar circumstances beyond the reasonable control of the Parties and which substantially interferes with the ability of a Party to perform its obligations under this Agreement.

B. An extension of time for any such cause (a "Force Majeure Delay") shall be for the period of the enforced delay and shall commence to run from the time of the commencement of the cause, if notice by the Party claiming such extension is sent to the other Party within thirty (30) days of knowledge of the commencement of the cause. Notwithstanding the foregoing, none of the foregoing events shall constitute a Force Majeure Delay unless and until the Party claiming such delay and interference delivers to the other Party written notice describing the event, its cause, when and how such Party obtained knowledge, the date the event commenced, and the estimated delay resulting therefrom. Either Party claiming a Force Majeure Delay shall deliver such written notice within thirty (30) days after it obtains actual knowledge of the event. The time for performance will be extended for such period of time as the cause of such delay exists but in any event not longer than for such period of time.

10. Governing Law; Venue

This Agreement shall be governed by, and construed in accordance with, the laws of the State of California, without regard to any otherwise applicable principles of conflicts of laws. Any action arising out of this Agreement must be commenced in the state courts of the State of California, County of Santa Barbara, and each party hereby consents to the jurisdiction of the above courts in any such action and to venue in the State of California, County of Santa Barbara, and agrees that such courts have personal jurisdiction over each of them.

11. Counterparts

This Agreement may be executed in any number of counterparts, each of which when so executed shall be deemed to be an original, and such counterparts together shall constitute one and the same instrument.